

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

AVANTE AT INVERNESS, INC.

Employer

and

Case 12-RC-9136

SERVICE EMPLOYEES INTERNATIONAL
UNION, FLORIDA HEALTHCARE
UNION¹

Petitioner

**REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION**

Avante at Inverness, Inc. (the Employer) operates a nursing home located at 304 South Citrus Avenue, Inverness, Florida.

On June 21, 2005, Service Employees International Union, Florida Healthcare Union (the Petitioner or the Union) filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act. The Petitioner seeks to represent all full-time and regular part-time certified nursing assistants, restorative aides, activities employees, dietary employees, cooks, housekeeping employees, laundry employees, and maintenance employees employed at the Employer's Inverness, Florida, facility, excluding all other employees, office clerical employees, professional employees, technical employees, confidential employees, guards and supervisors as defined in the Act. On July 5, 2005, a hearing officer of the Board held a hearing at the Tampa Regional Office and the parties filed briefs with me.

¹ The AFL-CIO designation has been dropped from Petitioner's name as requested by Petitioner. The Employer refused to stipulate to the change to Petitioner's name due to concerns regarding Petitioner's labor organization status. I note that Petitioner's disaffiliation from the AFL-CIO does not alter Petitioner's ability to function as a labor organization nor the fact that Petitioner exists for the purpose, in whole, or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

During the hearing, the parties stipulated that, in addition to the petitioned-for employees, the transportation employees, the unit secretary, floor care employees, and floating aides, also known as rehabilitation and activities aides, should be included in the appropriate unit. The parties also stipulated that medical records employee Tracey Facto, cook Edith Nelson, and maintenance employee Robert Braun are supervisors within the meaning of Section 2(11) of the Act and are therefore excluded from the bargaining unit.

The Employer contends that an appropriate unit must also include the four receptionists, the staff coordinator/central supply employee, the three physical therapy assistants, the four certified occupational therapy assistants and the social services assistant, whereas the Petitioner urges the exclusion of those employees from the unit. The Employer contends that the receptionists and the social services assistant must be included in the unit because those employees share a community of interest with the other petitioned-for employees and to leave them out of the unit would result in a small residual unit which would not be consistent with Board policy. The Employer also asserts that the staff coordinator/central supply employee is not a supervisor as defined by Section 2(11) of the Act and must be included in an appropriate unit because she shares a community of interest with the other petitioned-for employees. Finally, the Employer argues that excluding the physical therapy assistants and the certified occupational therapy assistants from the unit could lead to multiple bargaining units and would not be in accord with the 1974 Amendment to the Act. The Petitioner argues that none of the employees the Employer seeks to add to the unit share a community of interest with the petitioned-for employees. In furtherance of that position, the Petitioner asserts that the receptionists are business office clerical employees, the staffing coordinator/central supply employee is a supervisor within the meaning of Section 2(11) of the Act, the social services assistant does not share a community of interest with the

petitioned-for employees, and the physical therapy assistants and the certified occupational therapy assistants are technical employees.

I have considered the evidence and arguments presented by the parties on each issue.² I have concluded that the receptionists, the staffing coordinator/central supply employee, and the social services assistant should be included in the unit, but that the physical therapy assistants (PTAs) and certified occupational therapy assistants (COTAs) should be excluded from the unit. There are approximately 90 employees in the unit that I have found to be appropriate.

In the following sections, I will provide a brief overview of the operation of the Employer's facility, followed by descriptions of the job duties and facts surrounding each of the disputed classifications, and the reasoning supporting my conclusions. **I. Overview of Operations**

The Employer operates a skilled nursing facility with 104 beds and is licensed by the State of Florida. The facility has the following departments: administrative, admissions, marketing, bookkeeping, nursing, social services, dietary, housekeeping, laundry, maintenance and activities. The nursing department is divided into four units— 1 and 2 south and 1 and 2 north. The facility is a two story building. A corridor runs through the center of the facility on the first floor, ending at a rectangular shaped twostory atrium. The lobby is located between administrative offices. The kitchen is located immediately across the corridor from the lobby. The dining area is at the end of the facility furthest from the atrium. The physical and occupational therapy area is located between the kitchen and the dining room. The employee breakroom is near the kitchen. The accounts receivable office is across from the dining room. The director of nursing's office is next to the atrium, and the social services office is between the director of

² The briefs filed by the Petitioner and the Employer have been carefully reviewed and considered.

nursing's office and one of the administrative offices. The staffing coordinator's office is located directly across the hall from the director of nursing's office. On the first floor, resident rooms are located around the perimeter of the atrium and an activities office or station is located at one end of the atrium. The second floor of the facility consists solely of resident rooms and a utility area located around the perimeter of the atrium.

The administrator has overall responsibility for the facility. In addition to the nurses discussed below, others who work at the facility whom the parties also stipulated to exclude from the unit are the human resource manager, a bookkeeper, the social service director, a marketing director, an admissions employee, an RN weekend supervisor, a rehabilitation director, physical, occupational and speech therapists, "MDS/Care plan employees", an activities director, a dietary manager, and a housekeeping/laundry supervisor.³

The approximately 53 certified nursing assistants (CNAs), as well as the transportation employees, and presumably the registered nurses and licensed practical nurses, are all part of the nursing department. The director of nursing is Jill Smith. The assistant director of nursing and the two nursing unit managers report to Smith.⁴

CNAs report to the DON, the ADON and the unit managers. The CNAs are required to wear name tags and scrubs. CNAs must clock in and out of work. CNAs work shifts from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., 11:00 p.m. to 7:00 a.m., 6:00 a.m. to 2:00 p.m. or 2:00 p.m. to 10:00 p.m. The CNAs earn \$.50 per hour shift

³As noted above, the parties further stipulated to exclude medical records employee Facto, cook Nelson, and maintenance employee Braun as supervisors. For the most part, the parties did not stipulate to a rationale for excluding the others listed above, but the Employer called many "managerial" employees, and it appears that some of them are probably statutory supervisors. ⁴The parties agree that registered nurses, licensed practical nurses, the director of nursing, the assistant director of nursing, and the unit managers should be excluded from the unit.

differential for working between the hours of 3:00 p.m. and 7:00 a.m., and a shift differential of \$1.00 per hour for working on weekends.⁵

The CNAs are required to be certified by the State of Florida. Typically, CNAs complete a 100-hour training course prior to becoming certified by the State of Florida. However, a CNA can challenge the educational requirement and become certified by passing a written and clinical test.

The CNAs provide basic patient care to the residents. That care includes getting residents out of bed, feeding residents, dressing residents and changing residents.

They also take residents outside to smoke. On occasion, CNAs transport patients to the rehabilitation area for therapy, but do not go to that area for other reasons.⁶ The CNAs interact with the staffing coordinator on a daily basis to get supplies or to ask questions about staffing. CNAs have almost no interaction with the receptionists, other than to get their paychecks on a bi-weekly basis or to occasionally ask a receptionist for binders, and perhaps to request forms. CNAs appear to have no interaction with the social services assistant.⁷

II. Disputed Classifications

A. The Receptionists

There are four receptionists employed at the Employer's facility.⁸ Three of the receptionists are part-time employees. One of the part-time receptionists, Joanne Namey, works four hours a day as a receptionist and two hours a day helping to file

⁵ Wage rate information is not included in the record for most of the other job classifications discussed herein.

⁶ An exception are the restorative aides who go to the rehabilitation area to receive instructions and training from the PTAs and COTAs regarding the care of patients being transferred to their area.

⁷ The record contains little evidence about the other job classifications the parties agreed to include in the unit.

⁸ Employer Exhibit 1 indicates that there are three receptionists and one administrative assistant—Becki Camp. However, during the hearing, the parties stipulated that Becki Camp is a receptionist, rather than an administrative assistant.

medical records, thereby maintaining full-time hours.⁹ Becki Camp is the only full-time receptionist. According to their job description, receptionists must have a high school education, clerical experience, knowledge of office machines such as typewriters and calculators, the ability to multi-task, and have a positive attitude toward the elderly.

The receptionists are paid on an hourly basis and must clock in and out of work. They earn between \$7.50 and \$10.00 per hour. The receptionists wear business attire with nametags, rather than uniforms. They have the same break times and use the same break room as the employees who are in the petitioned-for unit. Receptionists receive the same benefits as certified nursing assistants (CNAs) and all other employees.

Receptionists report to human resources (HR) manager Tina Cypret and are stationed in the lobby near the front entrance. The receptionists answer telephones and transfer calls to the appropriate individuals or departments. They take personal messages for employees and, on occasion, may page an employee who has a personal telephone call. The receptionists maintain a list of residents' names and room numbers based on information provided to them by admissions. Receptionists sort incoming mail and put the mail in the appropriate mailboxes. They may also generate forms for use by some lead CNAs.¹⁰

Receptionist Becki Camp opens and dates the HR manager's mail. Camp also does some filing in the business office and distributes employee paychecks on a biweekly basis. Camp is responsible for ordering office supplies as directed by HR

⁹Namey accepted the part-time receptionist position following an on-the-job injury and assignment to light duty. The Employer permits Namey to work two hours a day in the medical records department so that she may maintain full-time employee status. However, the Employer indicated that Namey will not be permitted to continue working in medical records after her physician releases her from light duty. The record is silent regarding Namey's position prior to her injury.

¹⁰One CNA testified that she prints her own forms, but she did not testify regarding the general practice. The HR manager testified that the receptionists print forms for the lead CNAs.

manager Cypret or other department heads. On occasion, lead CNAs may also ask Camp to order supplies. When supplies arrive, Camp signs for the supplies and has the individual who ordered them come to get the supplies, presumably from the reception

area.¹¹

The receptionists spend the majority of their time in the lobby area, and would rarely, if ever, be in a patient care area. However, patients and their families are in the lobby area on occasion. CNAs also take some patients to the front of the building to smoke cigarettes. If an emergency arises while a patient is in the lobby or outside smoking, the receptionists are to page a nurse, but otherwise have no involvement in patient care.¹²

The receptionists do not perform any accounting or bookkeeping work. Nor do they have responsibility for billing or Medicaid or Medicare matters. B. Staffing Coordinator/Central Supply

Kris Vermilyea is the Employer's staffing coordinator/central supply employee. Vermilyea is part of the nursing department and she reports to the director of nursing (DON). Vermilyea has an office that is directly across from the DON's office. Vermilyea wears a uniform consisting of scrubs and, like all employees, a nametag. Vermilyea is paid on an hourly basis and must clock in and out of work. She has the same benefits as all of the Employer's employees. Vermilyea spends the majority of her time in her office, but does go onto the floor to put away supplies.

According to the Employer's job description for the staffing coordinator, the qualifications for the position include a high school diploma or GED and the ability to

¹¹ It is not clear from the record whether Camp is solely responsible for performing these duties, or whether other receptionists also perform these duties.

¹² While receptionists must attend certain in-service training sessions, such as training regarding blood-borne pathogens, it appears that the sessions attended by the receptionists are required by the State of Florida for all employees, regardless of whether or not the employee provides patient care.

read and speak English. The job description states that the duties include development of the master work schedule and daily staffing sheets, the maintenance of attendance records, and assisting with payroll verification.

The staffing coordinator develops a master staff schedule by following State of Florida guidelines. The guidelines regulate the number of CNAs and nurses who must be scheduled to work during any particular shift. If there is a need for additional staff due to an emergency or other reason, the staffing coordinator schedules the additional employees in conjunction with the DON. The staffing coordinator gathers employee preferences for the days of the week that an employee wishes to work and tries to accommodate those preferences when developing a schedule. The schedule is made for a six-week period of time and is approved by the DON.

The schedule also reflects employee requests for vacations. As long as there are enough employees available to fully staff the facility on any given day, vacation requests for that day are granted. If the grant of an employee's vacation request would result in too few employees available for work, the staffing coordinator can ask the employee if he or she will change his or her vacation request. The staffing coordinator does not need approval from the DON before asking employees if they will change their vacation requests. However, the record is silent regarding what happens if the employees refuse to alter their requests.

Employees are assigned to a unit when they begin working at the facility based on where there are open positions, but the Employer does attempt to honor requests to work in the dementia unit. An employee can request to be assigned to a different unit and will be moved when an opening becomes available. Although not clear from the record, it appears that these requests for reassignment are submitted to the staffing coordinator. The DON has shifted employees between units even when there were no

openings because of personality conflicts between employees. The schedule made by the staffing coordinator reflects any changes in unit assignments.

The DON testified that employees submit time off requests to the staffing coordinator, but that the staffing coordinator does not have authority to grant those requests. The DON did not explain how these requests are approved or disapproved when the requests are made without advance notice, such as the day before, or even during the day. However, one employee testified during the hearing that if she wanted to leave work early she usually asks a licensed practical nurse (LPN) or a registered nurse (RN) for permission, but must also ask the staffing coordinator if there is someone who can cover her spot on the floor. Thus, based on whether or not there are a sufficient number of employees, the staffing coordinator informs employees of whether they can or cannot have time off.

Employees who will be absent from work due to illness, or some other reason, can call the staffing coordinator. There is evidence that the staffing coordinator once told an employee who was attempting to call in sick that she had to report to work, but would be permitted to leave if the staffing levels were adequate. However, the DON indicated that the staffing coordinator does not have the authority to tell employees that they cannot be absent when they call in. There is also evidence that Vermilyea told one employee that if an employee misses a scheduled day of work on a weekend the employee must work on his or her next scheduled weekend off.

When it is known in advance that overtime opportunities will be available to employees, the staffing coordinator posts an overtime sign-up sheet near the time clock. According to the DON, it is the Employer's policy to grant overtime to employees based on seniority. However, it appears that the staffing coordinator may have picked less

senior employees to work overtime on some occasions.¹³ The DON asserted that she had no knowledge of employees being scheduled to work overtime on any basis other than seniority when it is known in advance that overtime will be available and she testified that the staffing coordinator does not have authority to schedule advance overtime in any other manner.

If employees are needed to work overtime, but the need is not known in advance, then the staffing coordinator will ask employees who are already working if they are willing to stay and work overtime. The staffing coordinator also has the authority to call employees who are not scheduled to work to see if they wish to work overtime. The staffing coordinator does not have the authority to direct employees to work overtime. The record indicates that if the Employer has difficulty finding employees willing to work overtime, it will grant incentives in an attempt to entice employees to work. However, the record does not reflect what happens if a sufficient number of employees do not wish to work overtime.

The staffing coordinator tracks attendance by completing a form whenever an employee is sick or takes an emergency personal day off. If an employee is absent or tardy an excessive number of times, as defined in the employee handbook, the staffing coordinator notifies the DON. The staffing coordinator may also make a recommendation regarding whether or not an employee should be disciplined for attendance issues. However, the DON conducts an independent investigation of an employee's attendance issues and it appears that she makes an independent decision regarding whether or not discipline is to be issued to an employee.

¹³ CNA Brenda Williams testified that on occasion when she has signed up for overtime, a less senior employee has been selected for the overtime opportunity. She also testified that Vermilyea decided to give the overtime opportunity to the less senior employee. However, Williams offered no explanation of how she knew that Vermilyea made the decision to grant overtime to the less senior employee.

Vermilyea is responsible for contacting applicants and scheduling interviews. She also sits in on interviews, although apparently ordinarily either the assistant director of nursing (ADON) or the DON is also present. During the interview, the staffing coordinator determines what shift an applicant would like to work and whether or not there are any openings on that shift. Both the DON and the HR manager testified that Vermilyea does not have authority to hire employees and the DON testified that either she or the ADON make the actual hiring decision.

The DON testified that the staffing coordinator does make recommendations regarding whether an applicant should or should not be hired. On one occasion, when the DON attempted to follow Vermilyea's recommendation to hire an employee, the employee applicant did not pass a drug test and ultimately was not hired. The DON has attempted to follow the staffing coordinator's recommendation to hire an employee on fewer than five occasions; there is no evidence regarding how many of those employees were ultimately hired apart from the one situation described above.

CNA Brenda Williams testified that she was interviewed and hired by Vermilyea during 2004, which was prior to the current DON being hired. Another employee, CNA Mary Jo Wood, testified that she was hired by Vermilyea in early 2005. Wood previously worked for the Employer from 1998 until 2002. Wood was interviewed by Vermilyea without the DON or ADON present and at the end of the interview Vermilyea informed Wood that she had been hired. However, it appears to be the Employer's policy to rehire former employees who left on good terms, as Wood did, as long as they receive a good reference from their most recent employer.

In addition to being the staffing coordinator, Vermilyea is the Employer's central supply person. Vermilyea orders supplies for the nursing department and the housekeeping department. Vermilyea inventories supplies on a weekly or daily basis and must maintain the "spin-down" list, which is a tracking tool that shows equipment,

code numbers, and amounts of supplies. When the supply of an item gets near or below a specified level, Vermilyea places an order for additional supplies. Vermilyea orders supplies online or by telephone. After the supplies are received, Vermilyea stocks the supplies in the appropriate place in the facility.

Vermilyea must maintain a budget for the purchase of supplies. Each week Vermilyea meets with the DON to discuss the budget and to ensure that she is within the budget. The DON then meets with the facility administrator to discuss the budget. If supplies or equipment must be purchased that exceed the budgeted amount, permission must be obtained from the facility administrator.

C. Social Services Assistant

Christy Edwards is the Employer's social services assistant. Edwards is a salaried employee and earns about \$13.00 an hour. Edwards wears a nametag, but does not wear a uniform. She works in the social services department and reports to the social services director, with whom she shares an office. Edwards must complete a time sheet every pay period, but does not clock in or out of work. Edwards is not a licensed social worker and does not have a degree in social work or any other subject, but she is a CNA.¹⁴ If Edwards is not in the office, she is backed up by the social services director.

The social services assistant meets with residents and residents' families in residents' rooms, the conference room, or the social services office. During the meeting, the social services assistant gathers the resident's social history and family information. The information obtained is discussed with the social services director who presents the

¹⁴ During the hearing, the Employer marked as Employer Exhibit 6 an unsigned document titled "Social Services Job Description." The HR manager testified that the job description accurately sets forth the duties performed by the social services assistant. This job description states that the incumbent should be a licensed social worker, but the HR manager acknowledged that this is not the Employer's practice. At a later point during the hearing, the Employer marked Employer Exhibit 7, which is titled "Social Services Assistant Duties," and is signed by the social services assistant and three members of management. The HR manager testified that Employer Exhibit 7 accurately reflected the duties performed by the social services assistant. Employer Exhibits 6 and 7 were received in evidence at the same time.

findings to the care plan committee, which consists of MDS coordinators, the rehab director, a unit manager, and the social services director.¹⁵ If the care plan committee determines that a resident needs certain services, such as an evaluation by an audiologist or a visit with a psychiatrist, the social services assistant will make arrangements for those services to be provided.

If, during a meeting with a resident, the social services assistant is given information that suggests, for example, that a patient is at risk for suicide, the social services assistant must get help for the patient. She gets help for the patient by reporting the issue to a nurse, presumably the nurse assigned to the patient, who then further reports it, presumably to the DON, ADON, or unit manager. The DON then assigns a CNA to remain with the patient until further care can be provided.

The social services assistant also helps with discharge planning by coordinating the requirements for discharge. If a resident is leaving the facility and returning home, the social services assistant will make arrangements for the therapy department to conduct a home evaluation. The director of rehabilitation informs the social services assistant of what equipment will be needed by the patient. The social services assistant then makes sure that whatever home health care equipment is needed is set up for the resident when the resident returns home. If the resident is going somewhere other than home, the social services assistant will make sure that the other location is prepared for the patient's arrival.

The social services assistant also meets with residents and family members to give them information about obtaining Medicaid coverage. So, for example, she will

¹⁵ In its brief, Petitioner, in arguing that the social services assistant should not be included in the unit, states that, among other things, the social services assistant participates on committees with managers. Conflicting testimony was given regarding whether or not the social services assistant participates on any committees, with the HR manager testifying that she may participate on the care plan committee under the direction of the social services director, while the DON testified that the care plan committee consists of the MDS coordinators, the rehab director, a unit manager and the social services director.

explain what a family needs to take with them to their appointment with the Florida Department of Children and Families (DCF). If necessary, the social services assistant will accompany a resident's family to the meeting with DCF. However, she has no involvement in the filing of Medicaid and Medicare claims and is not otherwise involved in billing, accounting or bookkeeping functions.

The social services assistant also takes grievances from residents and residents' family members, including grievances regarding the care provided by CNAs. The grievances, which are confidential, are given to the social services director who makes a determination about whether or not to get adult protective services involved in the matter. The social services assistant does not participate in the investigation of grievances.

The social services assistant is in patient care areas on a regular basis in order to conduct audits of patient's charts. However, it does not appear that the social services assistant interacts with the CNAs or most of the other members of the petitioned-for unit.¹⁶

Finally, the social services assistant conducts family support group meetings under the direction of the social services director.

D. Physical Therapy Assistants and Certified Occupational Therapy Assistants

Physical therapy assistants (PTAs) and certified occupational therapy assistants (COTAs) are hourly paid employees. PTAs and COTAs wear nametags and scrubs. COTAs work mainly in the therapy room and report to the occupational therapist and to

¹⁶ Although no testimony was introduced regarding the job duties and functions of the unit secretary, whom both parties stipulated should be included in the unit, the unit secretary's job description was entered in evidence as Union Exhibit 1. The job description states that one of the duties of the unit secretary is to "Collaborate with nursing staff, case manager, or social worker regarding specific discharge arrangements the secretary will be responsible for." Thus, it is possible that the social services assistant and the unit secretary have some interaction.

the director of rehabilitation. The PTAs report to the physical therapist and the director of rehabilitation. PTAs and COTAs receive the same benefits as other employees.

COTAs must be licensed by the State of Florida. In order to be eligible for licensing, the COTAs must complete a two year community college program. Similarly, physical therapy assistants must complete a two year degree and be licensed by the State of Florida.

The PTAs' job description indicates that the PTAs provide treatment and direct patient care in accordance with a physician's/physical therapist's plan. PTAs must also "participate in patient care plan conferences and rehabilitation meetings." They must "instruct patient's families and nursing staff in maintenance programs," and "participate in discharge planning." In addition, the PTAs are responsible for keeping records regarding the treatment and progress of patients and for communicating the patient's progress to other health team members. It also appears, according to the PTAs' job description, that PTAs are responsible for providing training to the staff in restorative and maintenance techniques. The COTAs' job description is identical to the PTAs' job description, except that the COTAs are to treat patients in accordance with the physician's/occupational therapist's treatment plan and must attend utilization review meetings.

Three floating aides (or rehabilitation aides) also work in the physical therapy department. The three floating aides are included in the petitioned-for unit. The duties of these three aides vary, but their main function is to assist in the transport of patients between patient rooms and the treatment areas. While rehabilitation aides may be present during the treatment of a patient, the PTAs or COTAs actually provide the treatment that has been prescribed. Moreover, PTAs can utilize equipment that generates ultra-violet light and can operate the ultrasound machine, while the rehabilitation aides cannot.

On the other hand, restorative aides administer range of motion and ambulation treatments to patients as instructed by the PTAs or COTAs. Restorative aides are CNAs. The treatment administered by a restorative aide is not as high a level of treatment as that administered by a PTA or COTA. Restorative aides must go to the rehabilitation area to receive instructions from PTAs and COTAs on patient care whenever a new patient is transferred from the rehabilitation department to the restorative area. The PTAs or COTAs give the restorative aides three days of trial instructions regarding each patient that is being transferred into their area. Restorative aides get new patients about once every two months.

The PTAs are on the floor on a daily basis and give limited instruction to CNAs, such as telling a CNA to lay down a patient in preparation for therapy. PTAs may also inform the CNAs if they are going to be introducing new equipment to be used with a patient, such as a new cushion in a resident's chair. COTAs are also on the floor on a daily basis, but the CNAs only have contact with them if they are working with one of the CNA's patients and there is no evidence in the record to suggest how often this occurs. **III. Analysis**

In making unit determinations in non-acute healthcare institutions, the appropriateness of the unit must be analyzed using the empirical community of interest test. Park Manor Care Center, Inc., 305 NLRB 872, 875 (1991). Under that test, the factors that the Board considered relevant in its rulemaking proceedings addressing bargaining units in acute health care facilities must be considered along with traditional community of interest factors. See Hillhaven Convalescent Center, 318 NLRB 1017 (1995).

A. Receptionists

I find that the receptionists should be included the unit. In so finding, I conclude that the receptionists are not business office clericals. The receptionists work in the

lobby and are not involved in finances or billing. They have no responsibility for Medicare or Medicaid matters, and have no other bookkeeping or accounting responsibility. The mere fact that the receptionists have little contact with employees in the petitioned-for unit is not a sufficient basis to exclude them from the unit, and I thus conclude that the receptionists must be included in the unit.¹⁷ See Lincoln Park Nursing and Convalescent Home, 318 NLRB 1160 (1995); Charter Hospital of Orlando South, 313 NLRB 951 (1994).

B. Staffing Coordinator/Central Supply

I find that staffing coordinator/central supply employee Vermilyea is not a supervisor within the meaning of Section 2(11) of the Act and should be included in the unit.

1. Supervisory Status of Staffing Coordinator/Central Supply Employee Section 2(11) of the

Act defines the term supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of the indicia specified in Section 2(11) is sufficient to confer supervisory status on an individual if the statutory authority is exercised with independent judgment and not in a routine manner. See American Commercial Barge Line Co., 337 NLRB 1070 (2002); Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir.

¹⁷In its brief, the Union argues that the Board has excluded receptionists with job duties similar to the duties of the receptionists at issue in this case, citing in support of its argument St. Elizabeth Hospital of Boston, 220 NLRB 325 (1975) and Duke University, 226 NLRB 470 (1976). However, the facts of this case are very similar to the facts in Lincoln Park Nursing and Convalescent Home, Inc., 318 NLRB 1160 (1995), in which the receptionists worked near the front lobby, answered and transferred incoming calls, performed typing for various department heads and had minimal contact with other nonprofessional employees. In fact, the record evidence shows that the receptionists here have more contact with other nonprofessional employees than did the receptionists at issue in Lincoln Park Nursing and Convalescent Home, Inc. Moreover, the receptionists in Lincoln Park Nursing and Convalescent Home, Inc., reported to the business office manager, but were still included in the unit.

1949), cert. denied, 338 U.S. 899 (1949). In determining if a recommendation is effective, the Board generally considers whether the recommended action was taken without independent investigation. See Children's Farm Home, 324 NLRB 61 (1997). Further, the scheduling of work and transfer of employees based on a formula does not establish that an employee is assigning work within the meaning of Section 2(11) of the Act. See Franklin Home Health Agency, 337 NLRB 826 (2002); Third Coast Emergency Physicians, P.A., 330 NLRB 756 (2000). Finally, the burden of proving supervisory status lies with the party asserting that such status exists. See Kentucky River Community Care, Inc., 532 U.S. 706, 711-712 (2001). Here, the record evidence is insufficient to conclude that staffing coordinator/central supply employee Vermilyea is a supervisor within the meaning of Section 2(11) of the Act.

Vermilyea creates the work schedules based on a staffing formula set forth by the State of Florida. The record evidence also establishes that employees submit vacation request forms to Vermilyea and that Vermilyea incorporates those requests into the work schedule. Vermilyea has the authority to ask employees if they are willing to alter their vacation requests if there are not a sufficient number of employees available during a given period. However, there is no evidence that Vermilyea has the authority to deny vacation requests, or to require employees to alter their vacation requests.

Similarly, there is some evidence that Vermilyea has told employees that they could leave work during the working day and that she told one employee that she had to report to work despite being sick. Yet, the totality of the evidence introduced suggests that CNAs who wish to leave work due to illness or other emergency get permission from their unit manager, the DON, the ADON, or other nurse and that Vermilyea is simply confirming that there are adequate staffing levels to permit the CNA to leave and arranging coverage for the departing employee.

In the instance where Vermilyea told an employee that she had to report to work, it appears that Vermilyea did so because staffing levels may have been inadequate without the employee. Thus, it is not clear that Vermilyea was exercising independent judgment when she told an employee to report for work, rather than merely relying on a staffing formula. Furthermore, there was only evidence of one instance where Vermilyea told an employee to report to work and the DON unequivocally testified that Vermilyea did not have the authority to require an employee to report to work.

It appears to be the Employer's policy to assign overtime to employees on the basis of seniority when it is known in advance that the opportunities will be available. Thus, under the Employer's policy, Vermilyea should simply select for overtime work the most senior employees who have signed the overtime list. On occasion, Vermilyea has selected less senior employees to work overtime. However, there is no evidence in the record regarding how many times this has happened, when it last happened, or why it happened. It is possible that Vermilyea simply made a mistake in her selection of employees to work overtime, or it is possible that the selections were made before the current DON was hired in September 2004. Furthermore, the DON testified, without contradiction, that she had no knowledge of any deviation from the policy of distributing overtime based on seniority and that Vermilyea has no authority to deviate from the policy. Thus, the record evidence fails to establish that Vermilyea has the authority to exercise independent judgment in selecting employees to work overtime. Selection of employees to work overtime using seniority is routine in nature and does not require the use of independent judgment.

Petitioner argues that there is evidence that Vermilyea has ordered employees to make up lost time by working additional days. Presumably, this refers to CNA Angela Edwards' testimony that Vermilyea told her that if an employee misses a scheduled day of work on a weekend the employee must work the next scheduled weekend off.

However, there is no evidence that any employee has been made to work on what would have been his or her weekend off after missing a scheduled weekend work shift. Furthermore, even if such a policy exists, there is no evidence that the policy was created and implemented by Vermilyea or that Vermilyea was doing anything other than informing Edwards of the policy.

Vermilyea brings to the attention of the DON employees who have been tardy or absent an excessive number of times. Vermilyea also gives the DON a recommendation regarding whether an employee should or should not be disciplined. However, the DON always conducts her own investigation into an employee's attendance issues and makes her own decision regarding whether or not to discipline an employee. Thus, the record evidence fails to establish that Vermilyea effectively recommends that employees be disciplined.

Both the DON and the HR manager testified that Vermilyea does not have authority to hire employees. Therefore, even if Vermilyea had authority to hire employees prior to the current DON being hired, that authority appears to have been rescinded. Furthermore, it is not clear whether or not Vermilyea actually made the decision to rehire Wood, or if the decision had been made prior to the interview. Thus, the record fails to establish that Vermilyea currently exercises authority to independently hire employees.

The DON could only recall one specific instance where she attempted to hire an employee recommended by Vermilyea, and in that instance the employee failed a drug test and was not hired. This evidence is not sufficient to show that Vermilyea exercises authority to effectively recommend the hire of employees.

No evidence was introduced into the record that would suggest that the staffing coordinator/central supply employee has the authority to transfer, suspend, lay off, recall, promote, discharge, or reward other employees, or responsibly to direct them, or

to adjust their grievances, or effectively to recommend such action using independent judgment¹⁸.

The Petitioner has failed to sustain its burden of proving that the staffing coordinator/central supply employee is a supervisor within the meaning of Section 2(11) of the Act. Having determined that she is not a supervisor within the meaning of the Act, I next consider whether the staffing coordinator/central supply employee shares a community of interest with the petitioned-for employees and must be included in the unit. 2. Community of Interest

I find that under the “empirical community of interest test” set forth in Park Manor, *supra*, the staffing coordinator/central supply employee should be included in the unit.

There is no contention that Vermilyea is a professional or technical employee and there is no evidence to support such a finding. Vermilyea interacts with CNAs on a daily basis. Her position is classified as part of the nursing department, as are the CNAs, and she is on the floor on a daily basis. The record is silent regarding Vermilyea’s wage rate, but like the CNAs she wears scrubs and nametags. Both positions require a similar level of education, a high school diploma or a GED, but the CNAs must be certified by the State of Florida. While the supplies ordered by Vermilyea are presumably used in patient care, there is no evidence that Vermilyea herself provides any patient care.¹⁹

Staffing coordinator/central supply employee Vermilyea shares somewhat of a limited community of interest with the CNAs, and apparently with the other employees in the petitioned-for unit.²⁰ However, if an employee or group of employees sought to be

¹⁸ The written job description for “staffing coordinator” mentions no duties related to hiring or discipline, nor does it otherwise suggest that the staffing coordinator is a statutory supervisor. ¹⁹ I do note that, according to the job description for the unit secretary, the unit secretary is also responsible for ordering supplies.

²⁰ As noted previously, very little evidence was introduced regarding the employees in any classifications other than the classifications in issue and the CNAs.

excluded cannot be an appropriate unit by themselves, then they must be included in the broader unit. See Hillhaven Convalescent Center, 318 NLRB at 1017, citing Park Manor Care Center, Inc., 305 NLRB at 875 fn. 18. Vermilyea, a single nonprofessional and nontechnical employee, cannot constitute an appropriate unit by herself, nor am I able to conclude that she and other employees sought to be excluded could together constitute an appropriate unit. Therefore, I find that the staffing coordinator/central supply employee should be included in the unit.

C. Social Services Assistant

I find that the social services assistant, Christy Edwards, should be included in the unit.²¹

The social services assistant, a former CNA, does not have a degree in social work, is not licensed, and there is little if any evidence that she has received any specialized training. In short, the social services assistant is neither a professional nor a technical employee.

Nor is the social services assistant a confidential employee. The Board will exclude an employee from a bargaining unit as a confidential employee only if the employee “assists and acts in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” See Lincoln Park Nursing and Convalescent Home, *supra* at 1164 citing B.F. Goodrich Co., 115 NLRB 722 (1956); Bakersfield California, 316 NLRB 1211 (1995). Here, the social services assistant takes confidential grievances from residents and their family

²¹ Petitioner cites The Baptist Memorial Hospital, 2225 NLRB 1165 (1976), in support of its argument that the social services assistant must be excluded from the unit. However, the facts of that case differ significantly from the facts here. In The Baptist Memorial Hospital, the social services clerks’ primary function appears to have been to complete forms and verify information received from patients so that the employer could determine whether or not the patient qualified for charitable care. Thus, unlike the social services assistant here, the primary function of the social services clerks in The Baptist Memorial Hospital appears to have been related solely to the financial aspects of the employer’s operation.

members, but the social services assistant plays no role in the investigation, which is conducted by the DON or the social services director. The social services assistant is merely acting in a ministerial capacity when she collects a grievance. Thus, the evidence fails to show that the social services assistant is acting in any more of a confidential capacity to persons who formulate, determine, and effectuate management policies than is a secretary who types grievances or other matters related to personnel problems or who has access to confidential files and whom the Board has found not to be a confidential employee. See Lincoln Park Nursing, *supra*.

Having concluded that the social services assistant is neither a professional nor a technical employee and is likewise not a confidential employee, I now consider whether or not she shares a community of interest with other employees and whether she could constitute an appropriate unit by herself or with other employees sought to be excluded from the unit. The social services assistant shares the same benefits as other employees, provides direct patient care, may coordinate discharge plans with the unit secretary, and may have some occasional casual interaction with CNAs. Otherwise, the evidence does not establish that the social services assistant shares a strong community of interest with other employees in the petitioned-for unit. Nonetheless, based on all the facts, and applying the empirical community of interest test, I conclude that the social services assistant cannot by herself, or with any other classification sought to be excluded, constitute a separate appropriate unit. Therefore, I find that the social services assistant should be included in the petitioned-for unit. D. The PTAs and COTAs

I find that the PTAs and COTAs are technical employees and should be excluded from the unit.

Both PTAs and COTAs are required to have 2-year degrees and to be licensed by the State of Florida. The PTAs and COTAs administer physician ordered

rehabilitation treatments to patients. While the restorative aides administer certain similar treatments, the treatments that they provide are of a less sophisticated nature and are administered at the direction of the PTAs or COTAs. The PTAs utilize equipment during the treatment of patients that employees in the petitioned-for unit are not permitted to use. I conclude, and neither party argues to the contrary, that the PTAs and COTAs are technical employees.

However, the mere fact that the PTAs and COTAs are technical employees does not automatically result in their exclusion from the unit under the empirical community of interest test set forth in Park Manor. If PTAs and COTAs share a significant community of interest with the employees in the petitioned-for unit, or if PTAs and COTAs cannot constitute a separate unit alone or with other employees sought to be excluded from the unit, then they must be included in the unit.

Here, the PTAs and COTAs wear the same uniforms, enjoy the same benefits as other employees in the petitioned-for unit, and have limited interaction with CNAs. They also provide direct patient care, as do some of the employees in the petitioned-for unit. On the other hand, the PTAs and COTAs are highly trained and skilled, they do not share supervision with other employees in the petitioned-for unit, they are presumably paid at a higher rate and, while they are occasionally on the floor, they have a separate work area. Furthermore, there is no evidence of permanent or temporary interchange between PTAs or COTAs and other job classifications in the unit. Thus, I conclude that the PTAs and COTAs do not share a significant community of interest with other employees in the petitioned-for bargaining unit.

Furthermore, the PTAs and COTAs along with the 17 licensed practical nurses employed by the Employer²², who are also technical employees²³, would constitute a

²² During the hearing, the parties agreed, without agreeing upon a rationale, that the licensed practical nurses should be excluded from the unit.

separate appropriate unit. Even if the licensed practical nurses are also supervisors as defined by Section 2(11) of the Act, as argued by the Employer without supporting evidence, the three PTAs and four COTAs are sufficient in number to constitute a separate appropriate unit by themselves. Therefore, I find that the PTAs and COTAs should be excluded from the unit.

IV. Conclusions and Findings

A. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

B. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case. ²⁴

C. The Petitioner claims to represent certain employees of the Employer.

D. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.

E. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time certified nursing assistants (CNAs), restorative aides, activities employees, dietary employees, cooks, housekeeping employees, laundry employees, maintenance employees, floor care employees, transportation employees, floating aides a/k/a rehabilitation and activities aides, receptionists, social service assistants, unit secretaries and staffing coordinator/central supply employees employed at the Employer's Inverness, Florida, facility, excluding business office clerical employees, professional employees, technical

²³ No evidence regarding the duties performed by the licensed practical nurses was introduced into the record. However, licensed practical nurses are typically found by the Board to be technical employees. See Park Manor, 305 NLRB at 876, fn. 22. ²⁴ The Employer stipulated that it is an employer engaged in commerce within the meaning of Section 2(6) and 2(7) of the Act and that it is a Florida corporation with an office and place of business located in Inverness, Florida, where it is engaged in the operation of a nursing home. Specifically, the Employer stipulated that during the past 12 months, in the course and conduct of its business operations described above, it derived gross annual revenues in excess of \$100,000 and purchased and received goods valued in excess of \$50,000 directly from points located outside the State of Florida.

employees, confidential employees, guards and supervisors as defined in the Act.²⁵

V. Direction of Election

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Service Employees International Union, Florida HealthCare Union. The date, time, and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or have been discharged for cause since the designated payroll period; (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date; and (3) employees engaged in an

²⁵ I have concluded that PTAs and COTAs are technical employees and they are excluded as such along with licensed practical nurses. Employee Edith Nelson, listed on Employer Exhibit 1 as a cook, bookkeeper Veronica Andrews, and maintenance employee Robert Braun are excluded as supervisors as stipulated to by the parties. Further specific exclusions are listed in section I. of this decision.

economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); N.L.R.B. v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list containing the full names and addresses of all eligible voters. North Macon Health Care Facilities, 315 NLRB 359 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized. Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the lists must be received in the Regional Office, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602, on or before **August 11, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. Since the lists will be made available to all parties to the election, please furnish two copies of the list.²⁶ If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

²⁶ The lists may be submitted by facsimile transmission to (813) 228-2874, or electronically to Region12@nrlrb.gov, as well as by hard copy. Only one copy of the list should be submitted if it is sent electronically or by facsimile.

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three full working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the elections are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the Election Notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the Election Notice.

IV. Right to Request Review

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W. Washington, D.C. 205700001. This request must be received by the Board in Washington by 5:00 p.m., EST on **August 18, 2005**. The request may not be filed by facsimile.

DATED at Tampa, Florida this 4th day of August 2005.²⁷

/s/[Rochelle Kentov]
Rochelle Kentov, Regional Director National
Labor Relations Board, Region 12 201 E.
Kennedy Boulevard, Suite 530 Tampa, Florida
33602

²⁷ In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board's office in Washington, D.C. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlr.gov.